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WM. R. STANS

NO. 345

In the Supreme Court of the United States

OCTOBER TERM, 1933

A. J. BUCK,

Appellant,

vs.

E. V. KUYKENDALL, Director of Public Works of the State of Washington,

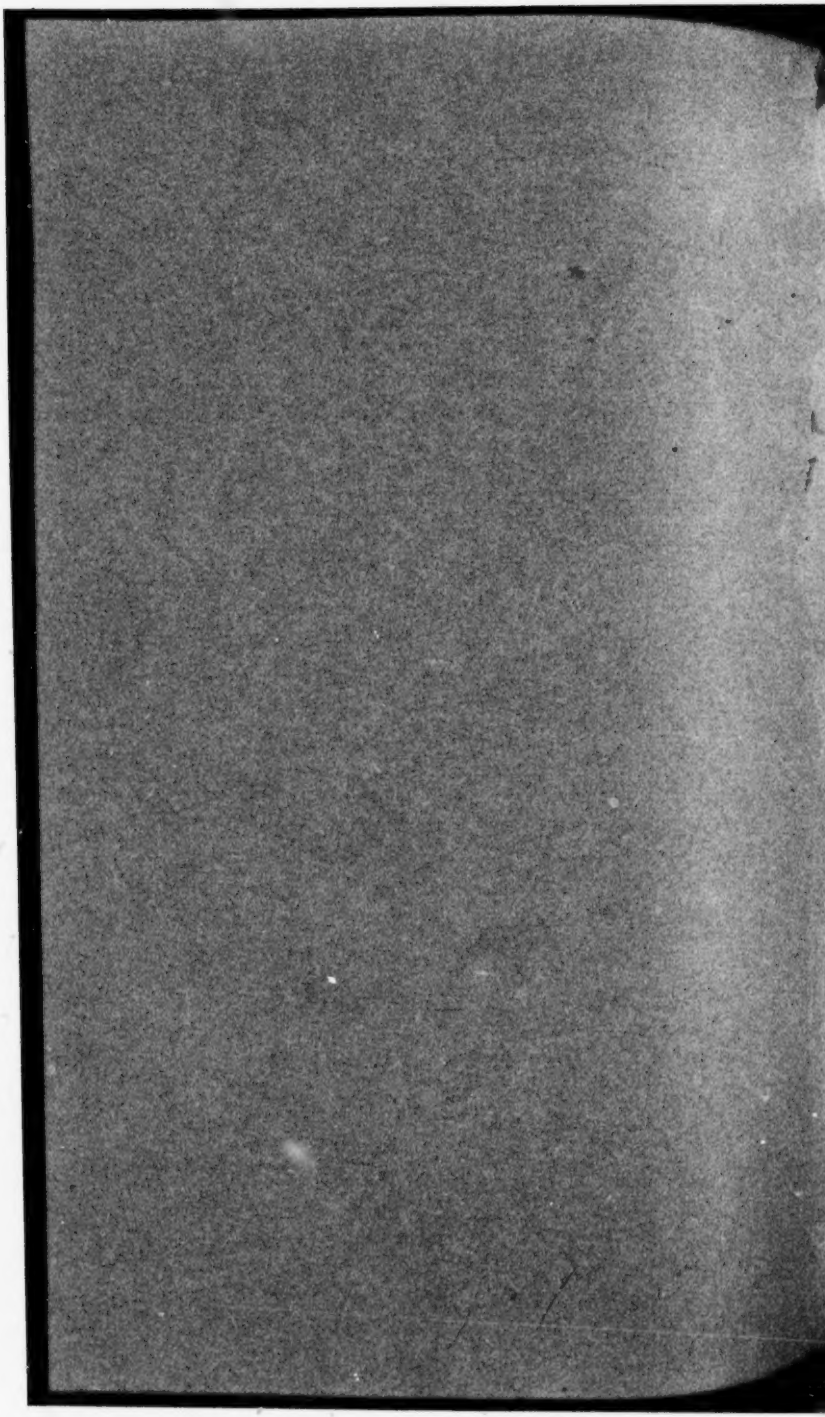
Appellee.

NO. 3

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

Brief of Appellant

W. R. CRAWFORD,
MERRILL MOORES,
Solicitors for Appellant.



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AUTHORITIES CITED

In the Supreme Court of the United States

A. J. BUCK, *Appellant,* vs. E. V. KUYKENDALL, Director of Public Works of the State of Washington, *Appellee.*	NO. 924

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

STATEMENT

I.

The amended complaint shows:

Congress duly enacted a certain "Federal Highway Act" in 1917, amended in 1921, granting finan-

cial aid to States adopting the same and the provisions thereof. The State of Washington adopted the same and its provisions in 1917 by an act of its legislature. That the said provisions prohibited tolls of any kind on such Federal aided highways; required the State to maintain the same in good repair and condition; required such highways to be of such width and strength as to take care of, not only the then traffic, but also the probable increase thereon; also required the construction or reconstruction of public highways, interstate in character, in order to take care of interstate traffic. The State had constructed and reconstructed the "Pacific Highway" between the City of Seattle and Vancouver, Washington, a distance of 194 miles, as part of a continuous highway extending from British Columbia to Mexico, and had received from the Federal Government under the provisions of the said "FEDERAL HIGHWAY ACT" more than one-fourth of the entire cost of such construction and reconstruction of said part of said "Pacific Highway," and the same has been opened and is being used for traffic.

II.

From Vancouver, Washington, to Portland, Oregon, the said "Pacific Highway" has been constructed and reconstructed under the same "FEDERAL HIGHWAY ACT" duly adopted by the State of Oregon, and the same has been opened and is being used for traffic.

III.

That the plaintiff had complied with all of the Motor Vehicle Laws of the State of Oregon, including the payment of license fees, and having complied with the provision of the Railroad Commission law of such State, had been granted a certificate or license to engage in the business of transporting persons for compensation in his motor vehicles on the said "Pacific Highway" from Portland, Oregon, to the Oregon boundary line as part of a continuous operation to the Cities of Tacoma and Seattle, Washington, on said "Pacific Highway," having paid all the necessary fees therefor. Plaintiff filed his time schedule and tariff showing a fare between Portland and Tacoma of $4.60 and between Portland and Seattle of $5.60.

IV.

The State of Washington duly enacted in 1921 a law relating to and regulating motor vehicles of all classes in the use of public highways, including the fixing of fees, the amount of which was determined by the weight of the vehicles and whether the use was private or the carrying of passengers for compensation. A further law was enacted the same year, requiring owners and operators to take out drivers' licenses. That the plaintiff had complied with all the provisions of such laws and the amendments thereto, enacted in the year 1923, and was entitled to operate his motor vehicles carrying persons for compensation on the public highways of the State as provided for in the said laws.

V.

The State of Washington enacted Chap. 111. of the laws of 1921, defining Auto Transportation Companies and regulating the business thereof. Sec. 4 of said law requires an auto transportation company before it can engage in business on the public highways in the State to apply for and receive a certificate or license to carry on such busi-

ness on such highways, between fixed termini in the State. Such law also provides that it does not repeal any of the laws of said State relating to motor vehicles and the owners or operators thereof. Such law was amended in 1923, fixing a charge of not more than 1 per cent of the gross revenue of such companies in order to pay for the cost of the supervision of such companies. Such law vests with the Director of Public Works of the State sole and exclusive authority to carry out the provisions of such law and make rules and regulations. That said law provides that no certificate or license can be granted in the same territory in which a holder of a certificate or license is operating; and the Director has the authority to grant or deny applications for such certificate or license within the territory not already occupied or to amend, alter or change any application, even to changing the termini or routes; further a surety bond or insurance policy must be furnished to such Director covering every motor vehicle operated, before the applicant can receive a certificate or license, so as to protect against any damage or liability arising from the operation of such motor vehicle engaging in such business. That Sec. 8 provides that neither the act nor any provi-

sion thereof shall or be construed to apply to interstate commerce, only when permitted under the provisions of the Constitution of the United States and the Acts of Congress; that Sec. 11 of said law provides that the law relating to and regulating motor vehicles, their owners and operators are not repealed or amended.

VI.

That the Director issued four certificates to operate on the "Pacific Highway" to four corporations under such law, one between Seattle and Tacoma, another between Tacoma and Olympia, another between Olympia and Kelso, and another between Kelso, Washington, and Portland, Oregon; all of such certificates or licenses restricted the holders thereof from engaging in any business except within the above named termini of each respective certificate holder. That the Director has refused, although applications therefor have been made by divers persons, to issue any certificate or license to carry interstate commerce over said "Pacific Highway" between Seattle and Tacoma, Washington, and Portland, Oregon, and there is now no through service between said Cities and said States by motor vehicles carrying interstate passengers.

VII.

That the aggregate fares by said four certificate holders between Seattle and Portland is $6.85 and between Tacoma and Portland is $5.85. The railroad fare between said respective points is $6.58 and $5.21 respectively. That said certificate holders operate motor busses carrying from 25 to 30 passengers and use said "Pacific Highway" for the purpose of doing business thereon, stopping thereon to take on or let off passengers. Such operation is not an inconvenience to the public or other traffic nor a hindrance on or an obstruction of said highway.

VIII.

That for many months prior to December, 1922, there had been in operation on the "Pacific Highway" between the Cities of Seattle and Tacoma, Washington, and Portland, Oregon, a motor bus line with a daily schedule and rates of fare of $5.50 between Tacoma and Portland, only carrying interstate passengers between said Cities and States, that such line was operated at a profit, but was compelled to cease such operation by the threats of arrest made by the Director because no certificate

or license had been granted by him, and in fact had been refused. The plaintiff, an experienced bus operator, after careful examination of the conditions in Seattle, Tacoma and Portland, made an application to the Director on the form prepared by said Director, for a certificate or license to engage in the business of carrying passengers by motor vehicles on the "Pacific Highway" between Seattle and Tacoma, Washington, and Portland, Oregon, no passenger to be taken on and discharged in the same State, the business to be wholly interstate; the motor busses to be used would not be as large nor heavy as the busses then used by said four certificate holders and no stops to be made on said highway to take on or let off passengers, but private property had been acquired along said line for such purposes; the said "Pacific Highway" not to be used for doing business thereon but solely as a thoroughfare. That plaintiff had complied with all of the laws of the State of Washington relating to and regulating motor vehicles and the owners and drivers thereof, including the payment of the necessary fees for licenses, and was authorized to use said highways by said motor vehicle laws. Further plaintiff, as required by the application, under oath

agreed to comply with all the laws relating to and regulating motor vehicles, owners and operators thereof, and the provisions of the said Chap. 111, as amended, and all the rules and regulations of said Director. That the plaintiff is and was financially able to acquire motor vehicles and engage in such interstate commerce, and to comply with all the laws of the State and the rules and regulations of the Director.

IX.

That the Director heard said application and denied the granting of such certificate or license, restricted as aforesaid, on the grounds that there were adequate transportation facilities between the said Cities and States by train and that the four certificates made a continuous route by motor vehicles between said Cities and States, by the passengers changing at said Cities of Tacoma, Olympia and Kelso, and that the law prohibited him from granting the same as the combined routes of said four certificate holders occupied the same territory, to wit, Seattle and Tacoma, Washington, and Portland, Oregon; and that the applicant (plaintiff) did not show that he was financially able to engage

in such business, if granted the certificate or license therefor. That the proposed operation in such interstate commerce would cause no hindrance or obstruction on said "Pacific Highway" to other traffic or to the public. The plaintiff agreed with said Director to comply with every provision of said Chap. 111, as amended, on oath, and is ready, willing and able so to do.

X.

That the Director threatened plaintiff, his servants, agents, employees and drivers with arrest, if the plaintiff operated his motor vehicles on the "Pacific Highway" in the State of Washington, between Vancouver and Seattle, Washington, carrying passengers for compensation, from the City of Portland, Oregon, operating in Oregon under the certificate or license issued by said State of Oregon, upon the sole ground that plaintiff had not been granted a certificate or license to engage in such business under the provisions of said Chap. 111, as amended, and the plaintiff will be prevented from the exercise of and will forfeit his rights in Oregon and lose the money paid to the State of Oregon, including the license fees for his motor vehicles.

XI.

That Sec. 4 of Chap. 111 of the Session Laws of 1921, as amended, requiring a certificate or license to engage in interstate commerce over Federal aided highways, restricting operation to one certificate holder in the same territory on a Federal aided highway, vesting sole jurisdiction in the Director to grant or refuse a certificate or license to engage in interstate commerce on the public highways of the State on occupied territory, and with power to change the termini and route of an applicant, and the acts of the defendant in denying a certificate or license to the plaintiff to engage in such interstate commerce by carrying passengers for compensation on motor vehicles on the "Pacific Highway," no passengers to be taken on and discharged in the same State, and no stops to take on or let off passengers on the public highway, under the same laws, rules and regulations regulating the said four certificate holders, take plaintiff's property without due process of law, destroy his privileges and immunities to engage in interstate commerce, not only in the State of Washington, but also in the State of Oregon, have created a monopoly on Federal aided

interstate highways, have violated the contract under which the State received Federal aid, discriminate against interstate commerce in favor of intra-state commerce on the same highways, and prohibit interstate commerce to be carried on under the same laws, rules and regulation as applied to intra-state commerce on public highways, all of which are contrary to and in contravention of the Constitution of the United States, especially the Fourteenth Amendment and Art. 1, Sec. 8 thereof, the protection of which was prayed.

XII.

A temporary injunction was prayed enjoining the Director from interfering with the operation of the plaintiff, his servants, agents, employees and drivers while engaging in interstate commerce by carrying passengers for compensation by motor vehicles on the "Pacific Highway" between the City of Seattle and the Southern boundary line at Vancouver, Washington, but not protecting the plaintiff in the violation of any of the laws relating to and regulating motor vehicles and their operators in the State of Washington or any other provision of the said law, Chap. 111, as amended, except such

provisions relating to the obtaining of the certificate or license to engage in business with motor vehicles on public highways carrying passengers for compensation, and that upon a final hearing the temporary injunction be made permanent and further, the said provisions of said law, Chap. 111, as amended, requiring a certificate or license to engage in interstate commerce on public highways be decreed void and unconstitutional.

A motion to dismiss the amended complaint on the ground that the same did not state any matters of equity or facts sufficient to entitle plaintiff to any relief, was presented and granted, and the amended bill of complaint was dismissed, and upon refusal of plaintiff to plead over a decree was entered dismissing the action.

No opinion was rendered by the Court in connection therewith.

Proper appeal was prayed and bond given.

Proper assignment of error was filed, which recited that the Court erred in dismissing the amended bill of complaint and in dismissing the cause.

SPECIFICATIONS OF ERRORS.

I.

Court erred in dismissing the amended complaint.

II.

Court erred in dismissing the cause of action.

III.

The decree dismissing the cause of action is erroneous in these particulars:

(a) That plaintiff's constitutional rights under the contract between the Federal Government and the State of Washington, evidenced by the "Federal Highway Act" and adoption thereof by the State, were not protected.

(b) In deciding that said Sec. 4 of said law did not create an unconstitutional monopoly on FEDERAL AID HIGHWAYS.

(c) That Sec. 4 of said State law, regarding a certificate or license as applied to plaintiff's operation, was constitutional.

(d) In deciding that Sec. 4 of said State law, and the acts of the Director thereunder, refusing a certificate or license on the ground that said law restricted the granting of more than one certificate in the same territory, which territory was Seattle, Washington, and Portland, Oregon, when there was no certificate holder operating in the same territory in the two States, were constitutional.

(e) That said Sec. 4 and the acts of said Director thereunder, were not a prohibition or burden on interstate commerce, and discriminating against interstate commerce, in favor of intra-state commerce over the same FEDERAL AID HIGHWAYS.

(f) That the Director, under Sec. 4 of said law, was empowered to prevent plaintiff's said operation from the State of Oregon into Washington, having complied with all of the laws of the States of Oregon and Washington, relating to and regulating motor vehicles, their owners and operators, and having a proper certificate or license from the State of Oregon.

(g) That the action of the Director in refusing to grant a certificate or license to plaintiff to engage wholly in interstate commerce on the "Pacific Highway," Federal aided, when he had complied with all laws and had applied to the Director for such certificate or license and under oath had announced that he would comply with all of the laws relating to and regulating motor vehicles, their owners and operators, and all the provisions of law, Chap. 111, as amended, and the rules and regulations of the Director, was not arbitrary but was constitutional.

(h) That the action of the Director prohibiting and preventing the engaging of interstate commerce from the State of Oregon into the State of Washington was not arbitrary and discriminating against interstate commerce, but was constitutional.

ARGUMENT.

I.

THE FEDERAL HIGHWAY ACT AND THE ADOPTION OF THE PROVISIONS THEREOF BY THE STATE OF WASHINGTON CONSTITUTE A CONTRACT PROTECTED BY THE FEDERAL CONSTITUTION. THE PROVISIONS OF THE STATE LAW, CHAP. 111, OF THE LAWS OF 1921, AS AMENDED, PREVENTING UNIMPEDED TRAFFIC ON FEDERAL AIDED HIGHWAYS OR GRANTING AN EXCLUSIVE PRIVILEGE TO USE SUCH FEDERAL AIDED HIGHWAYS IN CERTAIN TRAFFIC, IMPAIR SUCH CONTRACT AND ARE UNCONSTITUTIONAL. SAID PROVISIONS CREATE A MONOPOLY, DISCRIMINATE AGAINST AND PROHIBIT THE FREE USE OF SAID FEDERAL AIDED HIGHWAYS FOR TRAFFIC.

(Rec. pp. 2, 3, 4, 5, 9, 10).

The following parts of said "Federal Highway Act", and the State law adopting the same are set out herein:

Sec. 2 (Terms used in act defined.) That, when used in this Act, unless the context indicates otherwise—

The term "Federal Aid Act" means an Act entitled "An Act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes," approved July 11, 1916, as amended by Sections 5 and 6 of an Act entitled "An Act making appropriations for the service of the Post Office Department for the fiscal year ending June 30, 1920, and for other purposes," approved Feb. 28, 1919, and all other Acts amendatory thereof or supplementary thereto.

The term "highway" includes rights of way, bridges, drainage structures, signs, guard rails, and protective structures in connection with highways, but shall not include any highway or street in a municipality having a population of two thousand five hundred or more as shown by the last available census, except that portion of any such highway or street along which within a distance of one mile the houses average more than two hundred feet apart.

The term "highway department" includes any State department, commission, board or official

having adequate powers and suitably equipped and organized to discharge to the satisfaction of the Secretary of Agriculture the duties herein required.

The term "maintenance" means the constant making of needed repairs to preserve a smooth surfaced highway.

The term "construction" means the supervising, inspecting, actual building, and all expenses incidental to the construction of a highway, except locating, surveying, mapping, and cost of right of way.

The term "reconstruction" means a widening or a rebuilding of the highway or any portion thereof to make it a continuous road, and of sufficient width and strength to care adequately for traffic needs.

Sec. 6. (Projects receiving Federal aid approval by Secretary of Agriculture.) That in approving projects to receive Federal aid under the provisions of this Act the Secretary of Agriculture shall give preference to such projects as will expedite the completion of an adequate and connected system of highways, interstate in character. * * * Highways which may receive Federal aid shall be di-

vided into two classes, one which shall be known as primary or interstate highways, and shall not exceed three-sevenths of the total mileage which may receive Federal aid, and the other which shall connect or correlate therewith and be known as secondary or intercounty highways, and shall consist of the remainder of the mileage which may receive Federal aid. * * *

Sec. 8. (Types of surface and kinds of materials for construction, etc., of Federal aid roads.) That only such durable types of surface and kinds of materials shall be adopted for the construction and reconstruction of any highway which is a part of the primary or interstate and secondary or intercounty systems as will adequately meet the existing and probable future traffic needs and conditions thereon. The Secretary of Agriculture shall approve the types and width of construction and reconstruction and the character of improvement, repair and maintenance in each case, consideration being given to the type and character which shall be best suited for each locality and to the probable character and extent of the future traffic.

Sec. 9. (Freedom from tolls of Federal aid roads—width of roads.) That all highways constructed or reconstructed under the provisions of this Act shall be free from tolls of all kinds.

That all highways in the primary or interstate system constructed after the passage of this Act shall have a right of way of ample width and a wearing surface of an adequate width which shall be not less than eighteen feet, unless, in the opinion of the Secretary of Agriculture, it is rendered impracticable by physical conditions, excessive costs, probable traffic requirements, or legal obstacles. * * *

Sec. 11. (Surveys, plans, specifications and estimates—approval—setting aside State's share of Federal fund—public land states.) That any State having complied with the provisions of this Act, and desiring to avail itself of the benefits thereof, shall by its State highway department submit to the Secretary of Agriculture project statements setting forth proposed construction or reconstruction of any primary or interstate, or secondary or intercounty highway therein. * * *

Sec. 12. (State highway department—supervision of work on Federal aid roads—approval by Secretary of Agriculture.) That the construction and reconstruction of the highways or parts of highways under the provisions of this Act, and all contracts, plans, specifications and estimates relating thereto, shall be undertaken by the State highway departments subject to the approval of the Secretary of Agriculture. The construction and reconstruction work and labor in each State shall be done in accordance with its laws and under the direct supervision of the State highway department, subject to the inspection and approval of the Secretary of Agriculture and in accordance with the rules and regulations pursuant to this Act.

Sec. 13. (Payments to State on account of construction, etc., of Federal aid roads—how and when made.) That when the Secretary of Agriculture shall find that any project approved by him has been constructed or reconstructed in compliance with said plans and specifications, he shall cause to be paid to the proper authorities of said State the amount set aside for said project. * * *

Sec. 14. (Failure of State to maintain Federal aid road—duty of Secretary of Agriculture.) That should any State fail to maintain any highway within its boundaries after construction or reconstruction under the provisions of this Act, the Secretary of Agriculture shall then serve notice upon the State highway department of that fact, and if within ninety days after receipt of such notice said highway has not been placed in proper condition of maintenance, the Secretary of Agriculture shall proceed immediately to have such highway placed in proper condition of maintenance and charge the cost thereof against the Federal funds allotted to such State, and shall refuse to approve any other project in such State, except as hereinafter provided. * * *

Sec. 18. (Rules and regulations by Secretary of Agriculture—recommendations.) That the Secretary of Agriculture shall prescribe and promulgate all needful rules and regulations for the carrying out of the provisions of this Act, including such recommendations to the Congress and the State highway departments as he may deem necessary for preserving and protecting the highways and insuring the safety of traffic thereon.

Sec. 1 of the law, Chap. 76 of the laws of 1917.

> "The State of Washington hereby assents to the purposes, provisions, terms and conditions of the grant of money provided in an Act of Congress entitled 'An Act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes,' approved July 11, 1916."

The offer made by the Federal Government in the "FEDERAL HIGHWAY ACT" to extend financial aid in the construction and reconstruction of primary or interstate highways and secondary or intercounty highways to States adopting the same by proper legislative act, when accepted by the State of Washington, became a contract and could not thereafter be changed, amended or abrogated by any legislative act of the State of Washington, without infringement of the Federal Constitution.

> *McGehee v. Mathis,* 4 Wall. 145; 18 L. ed. 314.

The Federal Government constructed and for some years maintained a highway from Washington, D. C., through the States of Maryland, Pennsylvania, Ohio and into Indiana. The States of Maryland, Pennsylvania and Ohio enacted proper laws offering to purchase the portions of said high-

way in the respective States, which offers were duly accepted by Acts of Congress and such highway was conveyed to said respective States, subject to certain terms and conditions, one being that no tolls could be charged against owners of stage coaches carrying United States mail. The said states thereafter by legislative acts endeavored to modify and amend such condition. The Supreme Court of the United States held that the States, having entered into such contract with the Federal Government, could not amend or change the same, and such legislative acts of such States were held to violate the Constitution of the United States.

Seabright v. Stokes et al., 3 How. 151, 11 L. ed. 537.

Neil, Moore & Co. v. Ohio, 3 How. 720, 11 L. ed. 800.

Achison v. Hudleson, 12 How. 291, 13 L. ed. 993.

In Sec. 2 the term "reconstruction" was defined as including the widening or rebuilding highways or any portion thereof, to make a continuous road sufficiently wide and strong to care adequately for "traffic" needs.

Sec. 8 provides that such highways must be built to adequately meet existing and probable future "traffic" needs and conditions. Further, the Secretary of Agriculture must approve the types and width, and consideration must be given probable character and extent of future "traffic."

Sec. 18 vests Secretary with sole authority to administer the law, protecting the highways and the safety of "traffic" thereon.

As such provisions of said law were enacted long subsequent to decisions of the Supreme Court of the United States, defining the term "traffic," such term had an accepted meaning and Congress used such term advisedly.

"Commerce, undoubtedly, is traffic, but it is something more; it is intercourse."

Gibbons v. Ogden, 9 Wheat. 1, 189; 6 L. ed. 23, 68.

Interstate commerce consists of intercourse and traffic between the citizens of different States.

Pomeroy on Const. Law, Sec. 378.
Mobile County v. Kimball, 102 U. S. 691, 702; 26 L. ed. 238, 241.

McCall v. California, 136 U. S. 104, 108; 34 L. ed. 391, 392.

Addyston Pipe & Steel Co. v. U. S., 175 U. S. 211, 241; 44 L. ed. 136, 142.

The term "traffic" is defined as business: Goods or persons passing or being conveyed to and from along a railroad, canal, steamboat route or the like.

Universal Dict. Eng. Language.

To traffic is to pass goods and commodities from one person to another for equivalent of goods or money.

28 Am. & Eng. Ency., p. 443.
Levine v. State, 34 S. W. 969, 970.

The transportation of passengers on a street railway is "traffic."

South Covington & C. St. Ry. v. Covington, 235 U. S., 536, 544, 59 L. ed. 350, 353.

Sec. 9 of such law provides:

> "That all highways constructed or reconstructed under the provisions of this Act, shall be free from tolls of all kinds."

The term "tolls" has been defined as sums of money charged for the use of a road, bridge or the like of a public nature.

Bouvier 3283.
Webster's Dictionary.

Sands v. Manistee River Imp. Co., 123 U. S. 288; 31 L. ed. 149.

Also it has been decided that the tax on gasoline used by motor propelled vehicles on public highways is a toll, being charged for the maintenance of such highways.

In re Ops. 120 Atl. 629.

There is set out herein the following parts of the state law, Chapter 111, of the Laws of 1921, as amended:

Section 1. (a) The term "Corporation" when used in this act means a corporation, company, association, or joint stock association.

(b) The term "person" when used in this act means an individual, a firm or a co-partnership.

(c) The term "Commission" when used in this act means the Public Service Commission of the State of Washington, or the Director of Public Works or such other

board or body as may succeed to the powers and duties now held by the Public Service Commission.

(d) The term "Auto transportation company" when used in this act means every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing any motor propelled vehicle not usually operated on or over rails used in the business of transporting persons, and, or, property for compensation over any public highway in this state between fixed termini or over a regular route and not operating exclusively within the incorporated limits of any city or town: Provided, That the term "auto transportation company," as used in this act, shall not include corporations or persons, their lessees, trustees, receivers or trustees appointed by any court whatsoever, in so far as they own, control, operate or manage taxicabs, hotel busses, school busses, motor propelled vehicles, operated exclusively in transporting agricultural, horticultural, or dairy or other farm products from the point of production to the market, or any other carrier which does not come within the term "auto transportation company" as herein defined.

Sec. 4. No auto transportation company shall hereafter operate for the transportation of persons and, or, property for compensation between fixed termini or over a regular route in this state, without first having obtained

from the Commission under the provisions of this act a certificate declaring that public convenience and necessity require such operation; but a certificate shall be granted when it appears to the satisfaction of the Commission that such person, firm or corporation was actually operating in good faith, over the route for which such certificate shall be sought on January 15th, 1921. Any right, privilege, certificate held, owned or obtained by an auto transportation company may be sold, assigned, leased, transferred or inherited as other property, only upon authorization by the Commission. The Commission shall have power, after hearing, when the applicant requests a certificate to operate in a territory already served by a certificate holder under this act, only when the existing auto transportation company or companies serving such territory will not provide the same to the satisfaction of the Commission, and in all other cases with or without hearing, to issue said certificate as prayed for; or for good cause shown to refuse to issue same, or to issue it for the partial exercise only of said privilege sought, and may attach to the exercise of the rights granted by said certificate such terms and conditions as, in its judgment, the public convenience and necessity may require.

Sec. 7. Every officer, agent or employee of any corporation, and every other person who violates or fails to comply with, or who procures, aids or abets in the violation of any provisions of this act, or who fails to obey, observe or comply with any order, decision,

rule or regulation, direction, demand or requirement, or any part of provision thereof, is guilty of a gross misdemeanor and punishable as such.

Sec. 8. Neither this act nor any provision thereof shall apply or be construed to apply to commerce with foreign nations or commerce among the several states of this Union except in so far as the same may be permitted under the provisions of the Constitution of the United States and the Acts of Congress.

Sec. 11. This act shall not repeal any of the existing law or laws, relating to motor propelled vehicles, their owners or operators, or requiring compliance with any condition for their operation.

Introduced into the House February 8, 1921.

Passed the Senate, March 7, 1921.
Approved by the Governor, March 17, 1921.

The term "traffic" is not one of restriction, but embraces all kind or character of use of such public highways by any means or instrument of transportation, whether or not there is a charge, for the use of the means or instruments by the owner thereof, to others for transportation.

The provision of Section 9, relating to such highways and prohibiting the exaction of tolls of all kinds for the use thereof, places an additional safeguard upon the rights to the free use of such highways by "traffic."

If Section 4 of the State law, set out above, prohibiting the use of such public highways, protected by the "Federal Highway Act," except to one person or corporation in the same territory using such highway, in order to transport persons, or property, thereon by motor vehicles is constitutional, then the State can prohibit the free use of such highways by any class either of motor vehicles or of persons, and the entire meaning of the Federal Highway Act and the protection thereof can be destroyed and a favored few would have absolute monopoly in "traffic" thereon.

Fortunately we have decisions by your Honorable Court which foreclose any argument even, that the term "free from tolls," grants a free use and passage on public highways for all. Such decisions were rendered long prior to the enacting by Congress of the "Federal Highway Act" and the adoption thereof by the State of Washington, and

such decisions were incorporated in and became a part of such Congressional and State legislations.

The first cases arose under the contracts referred to herein-above, by the Federal Government and the State of Maryland, Pennsylvania and Ohio, in which the Federal Government was protected against tolls exacted against contractors hauling United States mail by stage coaches, as the contracts protected United States mail. Such contracts, however, did permit the exaction of tolls on all other users of such highways.

Section 9 prohibits tolls of all kinds to be levied for any trafficker on all such constructed or reconstructed public highways.

Seabright v. Stokes et al, 3 How. 151; 11 L. ed. 537.

Neil, Moore & Co. v. Ohio, 3 How. 720; 11 L. ed. 800.

Achison v. Hudleson, 12 How. 291; 13 L. ed. 993.

In another case the provisions of land grants donating lands to railroad companies providing the use thereof by the Government should be free from tolls or other charges, were interpreted and

it was held that the term "free from tolls or other charges" meant the unrestricted use of such railroads, but not the equipment thereon. In delivering the opinion of the court Mr. Justice Bradley said:

> "In view of the legislative history and practice referred to, it seems impossible to resist the conclusion, when we meet with a legislative declaration to the effect that a particular railroad shall be a public highway, that the meaning is, that it shall be open to the use of the public with their own vehicles; . . . . And when this right of the use of the road is granted "free from all tolls or other charge for transportation of any property or troops of the United States," it only means, that the Government shall not be subject to any tolls for the use of such road."
>
> *Lake Superior etc. R. R. Co. v. United States,* 93 U. S. 442; 23 L. ed. 965, 970.

Said case was cited with approval.

> *U. S. v. Union Pacific Ry. Co.,* 249 U. S. 354; 63 L. ed. 643.

In another case the construction of certain provisions of a charter of a canal company, granted by Maryland and Delaware, was before this Court for

decision. In such case it was insisted by the Canal Company that the provisions declaring the canal and the works, to be erected thereon when completed, be held a public highway, free for the transportation of all goods, commodities or produce whatsoever on payment of the toll imposed by the act, prohibited the free passage of boats or passengers except upon payment of tolls. In the opinion of the Court delivered by Mr. Chief Justice Taney it was said:

> "The error consists in treating words, which were intended as a limitation of the powers of the corporation, as a restriction upon the rights of the public. In the opinion of the Court, the words in question were intended to guard against the exaction of other or higher tolls than those given by law, and not to restrict the rights of passage. * * * They were not intended to restrict the provision immediately preceding, that the canal should be a highway, but more effectually to secure the right of the public by restricting the toll to be demanded to the toll imposed by the act."
>
> *Perrine v. The Chesapeake & Delaware Canal Co.*, 9 How. 172, 187; 13 L. ed. 92, 98.

It is admitted that the provisions of Sec. 4 of said State law prohibit the use of "Federal Aided

Highways" except to one person or corporation within the same territory. The contract with the Federal Government and the provisions of the "Federal Highway Act" have been impaired, destroyed and held for naught. Said provision of said Sec. 4 is absolutely void and unconstitutional.

State ex rel. United Auto T. Co. v. Dept. Pub. Wks., 119 Wash. 381.

In Sec. 2 of said "Federal Highway Act" it is provided: "That, when used in this Act, unless the context indicates otherwise." The term "Highway" includes, etc., but does not include any highway or street in a municipality with a population of 2500 or more, except that portion thereof along which within a distance of one mile the houses average more than 200 feet apart.

It has been claimed that such definition prohibits the use by "traffic" under the provisions of said "Federal Highway Act," not only within such excepted part of a highway or street in a municipality, but also all other portions of a Federal Aided Highway. So that all the portions of the "Pacific Highway," interstate in character, are not within the protection of the said "Federal

Highway Act" by reason of the fact that the cities of Seattle, Tacoma, Chehalis, Centralia and Vancouver must be traversed in order to reach the State of Oregon. Such construction of such term of said Sec. 2 would not only be farcical, but would be contrary to the plain provisions of the said "Federal Highway Act" and do violence to the intention of Congress.

All the provisions of said "Federal Highway Act" show that the State alone was to receive financial aid and not municipalities which improve their streets by assessments upon the property abutting thereon.

The above cited definition of the term "Highway" in Sec. 2 referred to and covered only the expenditure of Federal moneys, and in no way restricts the use of all highways in the State any portion of which has received Federal aid. That such is the interpretation of the term "Highway" is seen by the following portions of said Act, in the definition of the term "reconstruction" providing for the making of a continuous road, in Sec. 6 an adequate and connected system of highways, not only interstate in character, but also

inter-county, Sec. 9 providing that all highways constructed or reconstructed shall be free from tolls of all kinds. The context of the provisions of said "Act" plainly indicate that the said restricted definition of the term "Highway" in Sec. 2 does not apply to the use by "traffic" and its rights to use all highways in the State of Washington, any part of which has been constructed or reconstructed under the provisions of said law.

Again, any person who operates exclusively on the streets of an incorporated city or town does not come within the provisions of the definition of the term "Auto Transportation Company" as defined in Sec. 1 of said Chap. 111, but does come within such definition if he uses the public highways outside the incorporated limits of such city or town. In other words, the State has not attempted by said law to regulate operations within cities or towns. So that as far as an operation between Seattle and Oregon is concerned, if the "Trafficker" is protected by the "Federal Highway Act," outside of incorporated cities or towns, he is also protected against the "Auto Transportation Company" law, within such cities and towns.

The Supreme Court of the State of Washington has interpreted the provisions of the "Motor Vehicle Act" and the "Auto Transportation Act" and decided that the Motor Vehicle Act was in no way repealed by the Auto Transportation Act, and that any person having complied with the Motor Vehicle Act has the right to use all of the public highways of the State for the doing of business thereon, except as the same may be prohibited by the provision of said Chap. 111, as amended.

In other words a "Trafficker" can use any Federal Aided Highway complying with the said Motor Vehicle Act, Chap. 96 of the Laws of 1921, as amended, protected by the provisions of the "Federal Highway Act," against the provisions of Sec. 4, at least, of said Chap. 111, as amended.

Carlsen v. Cooney, 123 Wash., 441.

In conclusion, we submit that the provisions of Sec. 4 of the State law, Chap. III, as amended, are void and unconstitutional, impairing the contract with the Federal Government and the provisions of the "Federal Highway Act," insuring unimpeded, unhindered and free passage for "traf-

fic" on any part or portion of any Federal Aided Highway, including extensions of such highway within any limits of any municipality.

II.

THE PROVISIONS OF THE LAW, CHAP. 111, LAWS OF 1921, AS AMENDED, REQUIRING A CERTIFICATE OR LICENSE TO ENGAGE IN INTERSTATE COMMERCE, IS UNCONSTITUTIONAL. (Rec. pp. 4 to 11 inclusive.)

"Commerce" as used in the United States Constitution, Article 1, Sec. 8, Clause 3, includes the fact of intercourse and of traffic and the subject matter of intercourse and traffic. The fact of intercourse and traffic embraces all the means, instruments, and places by and in which intercourse and traffic are carried on, and comprehends the act of carrying them on at these places by and with these means. The subject matter of intercourse and traffic may be either things, goods, chattels, merchandise or persons.

McCall v. California, 136 U. S. 104; 34 L. ed. 391.

Gloucester Ferry Co. v. Penn., 114 U. S. 196; 29 L. ed. 158.

Crandell v. Nevada, 6 Wall. 35; 18 L. ed. 745.

Welton v. Missouri, 91 U. S. 275; 23 L. ed. 374.

Hall v. DeCuir, 95 U. S. 485; 24 L. ed. 547.

Chicago & N. W. R. Co. v. Fuller, 17 Wall. 560; 21 L. ed. 710.

Congress, being empowered by the Constitution to regulate commerce among the several States, and to pass all laws necessary or proper for carrying into execution any of the powers specifically conferred, may make use of any appropriate means for this end. In consequence of this power Congress enacted the "FEDERAL HIGHWAY ACT" and donated financial aid in order to more satisfactorily regulate commerce between the States, by constructing public highways, interstate in character.

Luxton v. North River Bridge Co., 153 U. S. 525; 38 L. ed. 808.

Dayton-Goose Creek R. Co. v. U. S., Vol. 6 and 7, Adv. Opinions 216.

A State law requiring the obtaining of a license to engage in interstate commerce in the State is unconstitutional and can not be defended as a police measure. The following leading cases upon such principle, established by decision after decision by this Honorable Court, are cited. In the following case the State, not only required a license to do interstate express business in the State, but also conditioned the privilege to do such business upon a sufficient showing of financial ability to engage therein. In delivering the opinion of your Court, Mr. Justice Bradley said:

> "The law of Kentucky, which is brought in question by the case, requires from the agent of every express company not incorporated by the laws of Kentucky a license from the auditor of public accounts, before he can carry on any business for said company in the State. This, of course, embraces interstate business as well as business confined wholly within the State. It is a prohibition against the carrying on of such business without a compliance with the state law. And not only is a license required to be obtained by the agent, but a statement must be made and filed in the auditor's office showing that the company is possessed of an actual capital of $150,000.00, either in cash or in safe investments, exclusive of stock notes. If the subject is one which apper-

tained to the jurisdiction of the State Legislature, it may be that the requirements and conditions within the State would be promotive of the public good. It is clear, however, that it would be a regulation of interstate commerce in its application to corporations or associations engaged in that business; and that is a subject which belongs to the jurisdiction of the National and not the State Legislature. . . . To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; . . . We have repeatedly decided that a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it. *Pickard v. Pullman Southern Car Co.* 117 U. S. 34 (29; 785); *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489 (30; 694); *Leloup v. Port of Mobile,* 127 U. S. 640 (32; 311); *Asher v. Texas,* 128 U. S. 129 (32; 368); *Stoutenburgh v. Hennick,* 129 U. S. 141 (32; 637); *McCall v. California,* 136 U. S. 104 (34; 392); *Norfolk and W. R. Co. v. Pennsylvania* Id. 114 (394). . . . We do not think that the difficulty is at all obviated by the fact that the express company, as incidental to its main business (which is to carry goods between different States), does also some local business by carrying goods from one point to another within the State of Kentucky. This is probably quite as much

> for the accommodation of the people of that State as for the advantage of the company. But whether so or not, it does not obviate the objection that the regulation as to license and capital stock are imposed as conditions on the company's carrying on the business of interstate commerce, which was manifestly the principal object of its organization. These regulations are clearly a burden and a restriction upon that commerce, whether intended as such or not they operate as such."
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> *Crutcher v. Kentucky,* 141 U. S. 47, 56, 57, 58, 59; 35 L. ed. 649, 652, 653.

In an action where the constitutionality of an ordinance of a city was in issue involving a license, the ordinance was declared unconstitutional under the commerce clause as effecting interstate commerce by putting a burden thereon. The defense was that the city under the police power had authority to place a tax on the doing of such interstate commerce. After citing and commenting on many cases involving the power of States and Cities to exact licenses as being regulations of commerce, Mr. Justice Brewer in delivering the opinion of the Court said:

> "It is clear, therefore, that this license tax is not a mere police regulation, simply inconveniencing one engaged in interstate commerce, and so only indirectly effecting the

> business, but is a direct charge and burden upon that business; and if a State may lawfully exact it it may increase the amount of exaction until all interstate commerce in this mode ceases to be possible. And notwithstanding the fact that the regulation of interstate commerce is committed by the Constitution to the United States, the State is enabled to say that it shall not be carried on in this way, and to that extent to regulate it."

Again, in commenting on the case of *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489 (30: 694), in which the constitutionality of a license law of Tennessee was involved, we find the following in the opinion,

> "The statute made no discrimination between those who represented business houses out of the state and those representing like houses within the state. There was, therefore, no element of discrimination in the case, but, nevertheless, the conviction was set aside by this Court on the ground that whatever the state might see fit to enact with reference to a license tax upon those who acted as drummers for houses within the state, it could not impose upon those who acted as drummers for business houses outside of the state (and who were, therefore, engaged in interstate commerce) any burden by way of a license tax."

Brennan v. Titusville, 153 U. S. 289, 303, 304; 38 L. ed. 719, 723, 724.

In the instant case, there is no question of police power as the appellant has complied with all the requirements of all laws excepting the provisions of Chapter 111, as amended, requiring a certificate or license, and offered to comply with them.

In a case involving a ferry between Canada and the United States the Supreme Court of the United States held that an ordinance requiring the taking out a license in order to carry on the business of interstate commerce was unconstitutional and Mr. Justice Hughes in delivering the opinion said:

> "The fundamental principle involved has been applied by this Court in a great variety of circumstances and it must be taken firmly established that one otherwise enjoying full capacity for the purpose can not be compelled to take out a local license for the mere purpose of carrying on interstate or foreign commerce." (Citing in support thereof a large number of cases.)
>
> *Sault Ste. Marie v. International Transit Co.*, 234 U. S. 335, 341; 58 L. ed. 1337, 1341.

A State under police power, can not justify interference with interstate commerce or impede

interstate traffic or impair the usefulness of its facilities for such traffic.

Kansas S. R. Co. v. Kaw Valley Drainage Dist., 233 U. S. 75; 58 L. ed. 857.

We call the Court's attention to the following cases, showing that the commerce clause protects the use of streets of municipalities by wagons and automobiles as instruments of interstate commerce, against the enforcement of licenses on such vehicles or the business carried on thereon.

A municipality can not require an express company to obtain a license as a condition of transacting interstate commerce on its streets. The company was using express wagons on the streets of New York to deliver packages which had been sent from points outside the State and also to collect packages to be sent outside the State. Mr. Justice Hughes in the opinion of the Court said:

> "The right of public control, in requiring such a license, is asserted by virtue of the character of the employment; but while such a requirement may be proper in the case of local or intra-state business, it can not be

justified as a prerequisite to the conduct of the business that is inter-state."

Barrett v. New York, 232 U. S. 14, 32; 58 L. ed. 483, 491.

The ordinance was defended as constitutional under the police power of the State, but it was held that the police power did not justify the imposition of a direct burden upon interstate commerce and it must be confined to matters which are appropriately of local concern. Local police regulation can not go so far as to deny the right to engage in interstate commerce, or to treat it as a local privilege, and prohibit its exercise in the absence of a local license. The complainant was held to be entitled to an injunction restraining the enforcement of the ordinance in protection of its interstate business as well as the wagons and drivers while engaged in such interstate business.

In the above case the license required was necessary in order to use the public highways in New York with wagons to carry on interstate commerce. The ordinance also provided that licenses were required of the drivers and the wagons used must be numbered and bonds in the sum of $100.00 each

on each wagon to protect the property carried. All of such provisions were declared unconstitutional as applied to interstate commerce. The appellant has paid the license fees and his drivers have paid their license fees and the operation of the appellant is interstate. If the express company, its wagons and drivers were entitled to protection by injunction against the enforcement of such ordinance, then this appellant, his vehicles and drivers are entitled to protection against the provisions of the State law.

It has been decided that a city had no constitutional right to prevent deliveries on the streets of the cities of commodities brought in from another State.

Wagner v. Covington, 251 U. S. 95; 64 L. ed. 157.

Where a person had moved his business across the river into another State in order to deliver liquor in wagons and other vehicles across such river in order to evade the liquor law in the place of his residence, the Court held that such transaction was interstate commerce and such business and the instruments thereof, to-wit, wagons and

teams, were protected by the commerce clause of the Constitution and the fact that he located across the river and his reprehensible past and the purpose to avoid the statute of the State, suffice to change the nature of the transactions. "Otherwise one of two persons located side by side in the same State, and doing the same business in identical ways might be engaged in interstate commerce while the other would not."

Kirmeyer v. Kansas, 236 U. S. 568; 59 L. ed. 721.

The above decision does not substantiate the position of the lower Court, in speaking on interstate commerce: "If one concern can establish a terminal across the State line and operate over the highways in this State without regulation, it is reasonable to presume that others will do likewise," etc. (Rec. p. 30). The lower Court, as is shown by its opinions (Rec. pp. 25 to 31 inc., 34 to 39 inc.), has consistently confused the Motor Vehicle law, Chap. 96 of the Session laws of 1921, as amended (Rec. pp. 18, 19), and Chap. 108 Session laws of 1921, as amended (Rec. p. 19), which laws contain within themselves every regulation in regard to motor propelled vehicles, their owners and driv-

ers in the use of the public highways of the State, with the Auto Transportation law, Chapter 111 (Rec. pp. 19, 20), which only relates to auto transportation companies and in no respect regulates the use of public highways, in so far as the comfort, convenience, welfare and safety of the public and the use by the public of such highways.

Carlsen v. Cooney, 123 Wash. 441.

III.

THAT THE PROVISIONS OF SAID LAW, CHAP. 111, RESTRICTING THE RIGHT OF ENGAGING IN BUSINESS ON THE PUBLIC HIGHWAYS TO ONE PERSON OR CORPORATION IN THE SAME TERRITORY, APPLIED TO INTERSTATE COMMERCE ARE UNCONSTITUTIONAL AND VOID.

(Rec. pp. 20, 21.)

(1) Such provisions of said law have created a monopoly of interstate commerce on Federal Aided Highways, by granting an exclusive privilege to use such highways for such commerce.

Sec. 4 of said law provides that a certificate is granted as of right to engage in the business transporting passengers or property on public highways for compensation to any person who was engaged in such business on or prior to January 15, 1921, and further that no certificate or license could be granted to operate in the same territory occupied by a certificate holder. The record herein shows that no person desiring to engage in interstate commerce between Seattle, Washington, and Portland, Oregon, on public highways can do so, by reason of the provisions of said law, and the acts of the appellee thereunder.

A State law granting an exclusive privilege to engage in the business of interstate commerce over the public highways is unconstitutional.

Gibbons v. Ogden, 9 Wheat. 1; 6 L. ed. 25.

Long v. Miller, 262 Fed. 363 (CCA)

The above proposition is elementary and we will only cite two cases that deal exclusively with monopolies in interstate commerce on Federal Aided Highways. In one case delivering the opinion of the Court, Mr. Chief Justice Waite said:

"Since the case of *Gibbons v. Ogden*, 9 Wheat., 1, it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating power of Congress. Post offices and post roads are established to facilitate the transmission of the intelligence. Both commerce and the postal service are placed within the power of Congress, because, being national in their operation, they should be under the protecting care of the National Government. . . . The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. . . . They extend from a horse with its rider to the stage-coach, from the sailing vessel to the steamboat, from the coach and steamboat to the railroads, and from the railroads to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were intrusted to the general government for the good of the nation, it is not only the right but the duty of Congress to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily encumbered by State legislation. . . . The State of Florida has attempted to confer upon a single corporation the exclusive right

> of transmitting intelligence by telegraph over a certain portion of its territory. . . . The legislation of Florida, if sustained, excludes all commercial intercourse by telegraph between the citizens of the other States and those residing upon this territory, except by the employment of this corporation. The United States can not communicate with their own officers by telegraph, except in the same way. The State, therefore, has attempted to regulate commercial intercourse between its citizens and those of other States, and to control the transmission of all telegraphic correspondence within its own jurisdiction."
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> *Pensacola Tel. Co. v. West. Union Tel. Co.*, 96 U. S. 1; 24 L. ed. 708, 710, 711.

Again, we find the following in the opinion delivered by Mr. Justice Harlan:

> "Certainly, it could never be held that a due regard to the rights of either the railroad company or of any corporation claiming under it required that the Government, charged by the Constitution with the duty of regulating interstate commerce, should permit the railroad company receiving National Aid to invest a corporation, not deriving its authority from the United States, with the exclusive right to enjoy its roadway—a National roadway—for purposes of telegraphic communication between the States. Even if the act of July 24, 1866, had never been passed we ought not to construe the Idaho act as permitting the railway company to

bind itself by agreement to give to one telegraph company a monopoly of the use of its roadway for telegraphic purposes. In none of the acts of Congress, having for their object the establishing of communication by railroad and telegraph between the Missouri River and the Pacific Ocean, is there to be found anything indicating a purpose to allow the post roads of the United States, particularly those aided by the Government, to fall, for all the purpose of telegraphic communication, under the exclusive control of one or more telegraphic corporations."

United States v. Union Pacific R. Co.,
160 U. S. 1, 43; 40 L. ed. 319, 334.

(2) The said provisions of said law and the acts of the Director thereunder, restricting the use of the "Pacific Highway" for interstate commerce between Seattle, Washington, and Portland, Oregon, to said four corporations holding certificates or licenses to operate wholly in intra-state commerce confined between their respective termini, discriminate, burden and prohibit interstate commerce between said cities and said States on said "Pacific Highway." In addition to the cases cited, supra, we call the Court's attention to a case where a State, by a legislative act, discriminated against interstate commerce in favor of intra-state

commerce in the use of public highways. It was shown in such case, as it is in the instant case, that the public highways would not be in any way injured, impaired or obstructed by the attempted interstate commerce. The statute was declared unconstitutional and in the opinion of the Court delivered by Mr. Justice McKenna, it was said:

> "At this late day it is not necessary to cite cases to show that the right to engage in interstate commerce is not the gift of a state, and that it can not be regulated or restrained by a state, or that a state cannot exclude from its limits a corporation engaged in such commerce. . . .
>
> The situation is not underestimated by appellant and he says: 'If the appellees had the right of way they might engage in interstate commerce, but their desire to engage in interstate commerce is a different thing from the means open to them to procure a right of way.' And it is further said, that 'the confusion of the right to engage in interstate commerce with the power to forcibly secure a right of way is the basis of appellees' case.'
>
> There is here and there a suggestion that the state not having granted such right the alternative is a grant of it by Congress. But this overlooks the affirmative force of the interstate commerce clause of the Constitution. The inaction of Congress is a declaration of freedom from state interference with

the transportation of articles of legitimate interstate commerce and this has been the answer of the Court to contentions like those made in the case at bar. . . .

"We place our decision on the character and purpose of the Oklahoma statute. The State, as we have seen, grants the use of the highways to domestic corporations engaged in intra-state transportation of natural gas, giving such corporations even the right to the longitudinal use of the highway. It denies to appellees the lesser right to pass under them or over them, notwithstanding it is conceded in the pleadings that the greater use given to domestic corporations is no obstruction to them. This discrimination is beyond the power of the state to make. As said by the Circuit Court of Appeals in the 8th circuit, no state can by action or inaction prevent, unreasonably burden, discriminate against, or directly regulate, interstate commerce or the right to carry it on. And in all of these inhibited particulars the statute of Oklahoma offends.

"And, we repeat again, there is no question in the case of the regulating power over the natural gas within its borders."

West v. Kansas Natural Gas Co., 221 U. S., 229, 261, 262; 55 L. ed. 716, 728, 729.

The above provisions of said State law also vests the Director with jurisdiction to grant or deny a

certificate, or license, or to annex any conditions he may desire, to forcing the doing of intra-state business by the applicant, when the only character of business desired was interstate, therefore such provisions of said law are unconstitutional as lodging the power in the director to couple the carrying out of interstate commerce by conditions and thereby making a direct burden thereon.

St. Clair County v. Interstate Etc. Co.,
192 U. S. 454; 48 L. ed. 519.

IV.

THE SAID PROVISIONS OF SAID LAW, CHAP. 111, AND THE ACTS OF THE APPELLEE THEREUNDER, IN PROHIBITING INTERSTATE COMMERCE TO ENTER THE STATE OF WASHINGTON, BY MOTOR VEHICLES CARRYING PASSENGERS FOR COMPENSATION, ARE ARBITRARY, VOID AND UNCONSTITUTIONAL.

(Rec. p. s. 22, 23, 24.)

The record shows that the Appellant had been granted the right by the State of Oregon to use the

"Pacific Highway" in the State by motor-propelled vehicles carrying passengers for compensation, from Portland, as a part of a continuous operation to the Cities of Tacoma and Seattle, Washington. Such passengers entering such vehicles at Portland to be delivered to such Cities in Washington; that Appellant had applied for and received from the State of Washington all necessary licenses entitling his said motor vehicles to use all the public highways of said State and had complied with all the laws of the State of Washington, relating to and regulating motor vehicles, the owners and drivers thereof; that the Appellant had filed his schedule of rates between Portland, Oregon, and Tacoma and Seattle, Washington, which rates were about 15 per cent less than the local fares charged by said four certificate holders and the said railroad fares between said points in said States; that the said Appellant was not permitted but was prohibited from entering said State of Washington, carrying persons from Portland, Oregon, at such reduced fares.

It is claimed that the provisions of said Chap. 111, requiring a certificate or license to enter the State by motor vehicles carrying passengers for

compensation over the Pacific Highway, a Federal aided Highway, are valid and constitutional, on the ground that Congress has not legislated on such subject. In the first place, we contend that the "Federal Highway Act," and the provisions thereof, furnish a full and complete answer to such contention; second, that section 8 of the "Auto Transportation Law," providing that the State must have permission by the Constitution or Acts of Congress before it can bring Interstate Commerce within the provisions of said law and no permission has been granted in our view of the case by either the constitution or an Act of Congress.

We have heretofore set out in our argument our position on the "Federal Highway Act."

Said section 8 is a restriction of the provisions of such law and is not a grant of power under the same. That such is the fact, is shown, as the provisions of said law only relate to the carrying on of the business and not the use of the public highways by motor vehicles, their owners and drivers, so that unless the Constitution is amended so as to give power to regulate interstate commerce, then the

State official, namely the Appellee, has no authority to include interstate commerce within his regulatory powers.

Even if the Court could conclude that the "Federal Highway Act" had no application as a protection against said provisions of said Sec. 4 of said law or the acts of the Appellee thereunder, yet the inaction of Congress is equivalent to a declaration that such interstate commerce shall remain free and untrammeled.

In one of the leading cases on the question of commerce among States it was held, that such Court had never consciously held otherwise than that, a Statute of a State, intended to regulate or to tax, or to impose any other restriction upon the transmission of persons, or property or telegraphic messages, from one State to another, is not within that class legislation which the States may enact in the absence of legislation by Congress; and that such Statutes are void even as to that part of such transmission which may be within the State. It was also held that the right of continuous transportation from one end of the country to the other is essential in modern times to that freedom of commerce from

the restraint that the States might choose to impose upon it and that the commerce clause was intended to secure.

Wabash St. & P. R. Co. v. Illinois, 118 U. S. 557; 30 L. ed. 244.

The attempt of a Municipality to regulate the interstate business of a street railway company is not justified by the absence of Federal Regulation.

South Covington & C. St. R. Co. v. Covington, 235 U. S. 538; 59 L. ed. 350.

The power vested in Congress to regulate commerce among the States cannot be stopped at the boundary line of the State, and the absence of a law by Congress is equivalent to its declaration that the importation of the article of commerce into the States shall be unrestricted. A State law prohibiting the importation of an article of trade between one State and another is a regulation of commerce between the States and void.

Leisy v. Hardin, 135 U. S. 100; 34 L. ed. 128.

A State cannot exclude, directly or indirectly, the subjects of interstate commerce, or, by the im-

position of burdens thereon, regulate such commerce, without Congressional permission.

Lyng v. Michigan, 135 U. S. 161; 34 L. ed. 150.

The inaction of Congress in prescribing rules covering transportation of any article of commerce from one State into another is equivalent to its declaration that such commerce shall be free from any State interference. The main object of commerce among the States under the Constitution of the United States, would be defeated by discriminating legislation of a State.

Welton v. Missouri, 91 U. S. 275; 23 L. ed. 347.

There can be no question that the transportation of persons from the State of Oregon into the State of Washington is interstate commerce and National in character and rules regulating the same should be uniform affecting all the States alike and in such regard the power of Congress is exclusive, and State regulations are prohibited.

Gloucester Ferry Co. v. Penn., supra.

No state has power to make any law or regulation which will affect the free and unrestrained

intercourse and trade between the States, and so long as Congress does not pass any law to regulate commerce among the several States, it thereby indicates its will that commerce shall be free and untrammeled; and any regulation of the subject by the States is repugnant to such freedom.

Brown v. Houston, 114 U. S. 622; 29 L. ed. 257.

To the same effect,

Walling v. Michigan, 116 U. S. 446; 29 L. ed. 691.

To the same effect,

Vance v. Vandercook Co., 170 U. S. 457; 42 L. ed. 1105.

A State law regulating the business of carriers of passengers is unconstitutional as far as it burdens interstate commerce or interferes with its freedom thereby in encroaching upon the exclusive power of Congress.

Hall v. De Cuir, supra.

V.

THAT THE ACTS OF THE SAID DIRECTOR HAVE OBSTRUCTED, HINDERED, IMPAIRED, DISCRIMINATED, AND PROHIBITED INTERSTATE COMMERCE ON FEDERAL AIDED HIGHWAYS AND WERE ARBITRARY, VOID AND UNCONSTITUTIONAL.

(Rec. pp. 1 to 11, inc.)

The record shows that there had been a continuous operation of a stage line between Seattle and Tacoma, Washington, and Portland, Oregon, for many months, up to December, 1922, engaging wholly in interstate commerce, and that the Appellee, by threats of arrest, had prohibited further operation of such line on the ground that he had not issued a certificate or license to such line; in consequence of such action of the Appellee, the Appellant was obliged to and did make an application, as directed by the Appellee, on a form prepared by him, for a certificate or license to engage in such interstate commerce between the Cities of Seattle and Tacoma, and the Southern Boundary line of the

State at Vancouver; the Appellee, after having required Appellant to apply for such certificate or license, denied such certificate or license, and the Appellee based his refusal upon the sole ground that he found there was no necessity of additional means of transportation from the State of Washington into the State of Oregon or from the State of Oregon into the State of Washington, in other words the Appellee set himself up as a power to decide whether or not interstate commerce between said States could or could not be prohibited, and then prevented such interstate commerce from entering the State of Washington. It does not seem open to argument that said actions of the appellee, as shown by the record, were not arbitrary and unreasonable, as a burden on and prohibition of interstate commerce and have taken the property of appellant without due process of law.

Authorities cited in Pars. 1, 2, 3 and 4.

VI.

THE ACTION OF THE LOWER COURT DISMISSSING THE AMENDED BILL OF COMPLAINT IS ERRONEOUS.

(Rec. pp. 13, 34 to 39, inc.)

The record shows that the lower Court had permitted an amendment to the original bill setting up additional matters showing that the actions of the Appellee were arbitrary, discriminatory and imposed burden on and prohibited interstate commerce. Appellant applied for an interlocutory injunction upon such amended complaint and Appellee thereupon filed an affidavit denying such said allegations in said amended complaint. The Court, composed of three judges, denied the application for an interlocutory injunction, on the ground that said affidavit of Appellee, not having been denied by Appellant, prevented the issuance of such interlocutory injunction on any ground of an arbitrary action by said Appellee. Thereafter the lower Court, composed of one judge, sustained the motion to dismiss the amended complaint and such amended complaint was dismissed. The amended complaint

was filed after leave of Court first obtained and in order to meet the views of the Court, composed of three judges, as expressed in its opinion, denying the application for an interlocutory injunction based upon the original complaint. There can be no question that the allegations of the amended complaint were sufficient to base relief on in connection with the charges against the Appellee, and evidently the lower Court in dismissing such amended complaint rested its decision upon the said affidavit of the Appellee. No argument is necessary to show that such action of the lower Court is erroneous.

The lower Court in the two opinions denying interlocutory injunctions (See pp. 25 to 31 inc., and 34 to 39 inc.), announced that the case of *Interstate Motor Transit Co. v. Kuykendall,* 284 Fed. 882, decided by the same Court, was binding and decisive of the instant case, relating to interstate commerce.

An examination of the *Interstate Motor Transit Co. v. Kuykendall* case disclosed that an action was instituted, against the Director of the Department of Public Works, E. V. Kuykendall, to have all of the provisions of Chap. 111, of the Laws of 1921, declared unconstitutional and for an injunction

against said Kuykendall, restraining him from enforcing any of the provisions of said law. There were no allegations in the complaint showing that the company had complied with any law of the State or any provision thereof, relating to and regulating motor vehicles, their owners or drivers, in the use of public highways; and further, no allegation showing that the company had complied with or had offered to comply with any of the provisions of said Chap. 111. The Court, in its opinion based the refusal of relief, as far as interstate commerce was concerned, upon decisions of the Supreme Court of the United States, which held that a State could constitutionally require the payment of license or tolls for the use of improvements on navigable waters and highways, which improvements had been made at the cost of the State and gave additional facilities to the commerce; the plaintiff company had not complied with such reasonable exactions for the use of such highways and did not even offer so to do, and therefore the State law which required such payments for the use of such highways was constitutional and that the company was not entitled to any relief. In such opinion the Court cited the cases of *Hendrick v. Maryland,* 235 U. S. 610;

59 L. ed. 385, and *Kane v. New Jersey,* 242 U. S. 160; 61 L. ed. 222, as conclusive. Such cases decided that a non-resident, coming into a state and using the public highways with his automobile, was obliged to pay a reasonable license fee as compensation for the use of improvements on the highways, and submit to a reasonable regulation compelling the registration of his automobile without cost.

Both of said cases had been instituted prior to the "Federal Highway Act," and such Act was not involved in the cases.

In the instant case the record discloses that in every way, manner and form, the Appellant had complied with each and every provision of every law relating to and regulating motor vehicles, their owners and drivers, on public highways, having paid all license fees and being entitled to the use of the public highways by his motor vehicles.

Carlsen v. Cooney, supra.

The above cases, as well as all the other cases cited in the opinion in said *Interstate Motor Transit Co. v. Kuykendall* case *supra,* on such proposition do not even intimate that the right to engage in interstate commerce could be prohibited, discriminat-

ed against or burdened, but hold that it is simply charged with reasonable fees or tolls to compensate the State for monies paid by it in order to improve the facilities for such commerce.

In the two opinions in the instant case, the Court, in spite of the fact that the allegations of the complaint and the amended complaint, and as set out in the said opinions, show that the Appellant had complied with all the laws, relating to and regulating motor vehicles, their owners and drivers, and had received license plates for each motor vehicle authorizing it to use the public highways of the State, carrying passengers for compensation, and had complied with all of the provisions of said law, Chap. 111, as amended, insofar as permitted to do, and that he was ready, willing and able to comply with any and every provision, again reiterated what was said in the said *Interstate Motor Transit Co.* case; namely, that the provisions of said law relating to the obtaining of a certificate or license was constitutional and the acts of the Appellee thereunder were not arbitrary and discriminatory, because the commerce clause did not prevent the State from exacting compensation for the use of the public highways of the State

by Appellant's motor vehicles, and that Appellant had not paid or offered to pay such license fees.

As is shown by the record, the only issues presented to the lower Court were, whether or not THE PROVISIONS OF CHAP. 111 OF THE LAWS OF 1921, AS AMENDED, RELATING TO THE OBTAINING OF A CERTIFICATE OR LICENSE, AND THE ACTS OF THE APPELLEE WERE CONSTITUTIONAL, ARBITRARY, DISCRIMINATORY AND CREATED A MONOPOLY ON FEDERAL-AIDED HIGHWAYS AS APPLIED TO INTERSTATE COMMERCE AND IMPAIRED THE CONTRACT BETWEEN THE FEDERAL GOVERNMENT AND THE STATE OF WASHINGTON.

There is not one single provision of said Chap. 111, as amended, that relates to the payment of one cent as compensation for the use of public highways of the State, the only provision is the charging of a per cent of the gross earnings of an Auto Transportation Company and all of such amount so collected is used entirely for the cost of the administration of the law itself.

RESISTING MOTION TO DISMISS

It is claimed in a motion to dismiss this appeal, that this Court has no jurisidiction under the provisions of Sec. 238 of the Judicial Code. The ground being that there is no Federal question involved, as the Appellant is estopped from contesting the provisions of the State Statutes, by applying for the said certificate or license, under the provisions of Sec. 4 of Chap. 111, of the Laws of 1921. In support of such motion the Appellee has cited a large number of cases on the question of estoppel. All of such cases announce that estoppel must be based upon benefits accepted and received as it would be inequitable for anyone having received benefits under a State law to thereafter in another litigation endeavor to show the unconstitutionality of such law.

Evidently, in the face of the record and the decisions, the Appellee considered that he should change his position and thus prevent a decision on the merits in this case. This is a change of the entire position of the Appellee in the lower Court,

as in no way and at no time has Appellee ever intimated even, that Appellant was estopped or had waived his constitutional rights by endeavoring to obtain recognition by the Appellee of the right to engage in interstate commerce. In the first place, the acts of the Appellee in preventing the Appellant from entering into this State with interstate commerce were arbitrary, unreasonable and unconstitutional, and it is admitted in the brief on the motion to dismiss, if such were the facts, the motion to dismiss should be denied. In the second place, the order made by the Appellee denying the application was not a judicial act, but is legislative.

Lake Erie & W. R. Co. v. State ex rel. Cameron, 249 U. S. 422; 63 L. ed. 684.

We have a right to test the constitutionality of such order denying appellant the right to engage in interstate commerce, as the record shows we did, including the same in the specifications of error. Appellant was compelled to make such application to the Appellee in order to prevent arrest; he was given a form prepared by the Appellee, to fill out, which he was forced to do. In the first opinion in the Buck case, on the original bill of complaint, it was said by the Court that, the plaintiff had not complied

with the challenged act, and at bar announced that he did not propose to comply with the provisions of the act, and that "when the plaintiff disposes himself in harmony with the reasonable provisions of the Act and is denied permission to operate, the Courts are open to grant such relief as may be warranted by the law and the facts."

In consequence of such opinion, the Appellant was compelled to, and did file the amended bill of complaint so as to show that he had complied with all the provisions of Chap. 111, as amended, and also all the rules and regulations of the Appellee, insofar as the Appellee would permit him so to do, and that he had been denied permission to operate in interstate commerce.

Such application and the refusal thereof by the Appellee and the opinion of the Court set forth in the record show that not only was any benefit derived by the Appellant, but that the Appellee was active in his endeavors, out of Court and in Court, to compel the Appellant to submit himself to the jurisdiction of said Appellee. We hardly think that Appellant is estopped from standing on his constitutional rights.

In a late case your Court held that the action of a railroad company in applying to the Railroad Commission of the State for a certificate authorizing a bond issue and the acceptance of the same upon refusal to pay the fee therefor, on the ground that interstate commerce was burdened thereby, was not estopped to attack the constitutionality of a Statute.

Union Pac. R. Co. v. Public Service Comm., 248 U. S. 67; 63 L. ed. 131.

The opinion of the lower Court regarding the compliance by the Appellant with the said provisions of Chap. 111, or his offer to do so, was no doubt based upon the folllowing excerpt from the opinion in the Hendrick v. Maryland case:

> "If the Statute is otherwise valid, the alleged discrimination against residents of the District of Columbia is not adequate ground for us now to declare it altogether bad. At most they are entitled to equality of treatment, and in the absence of some definite and authoritative ruling of the Courts of the state, we will not assume that, upon a proper showing, this will be denied.
>
> "The record fails to disclose that Hendrick had complied with the laws in force within the District of Columbia in respect of registering motor vehicles and licensing operators, or that he applied to the Maryland commis-

sioner for an identifying tag or marker,—preresquisites to a limited use of the highways without cost by residents of other states under the plain terms of section 140a. He cannot, therefore, set up a claim of discrimination in this particular. Only those whose rights are directly effected can properly question the constitutionality of a state statute, and invoke our jurisdiction in respect thereto."

Hendrick v. Maryland, 235 U. S. 610, 621; 59 L. ed. 385, 390.

We submit that the motion to dismiss should be denied and, that the decree of the lower Court be reversed and your Honorable Court enter such decree as may be proper, the premises considered.

Respectfully submitted,

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